ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Uitvlugt, 2022 ABASC 1 **Date: 20220106**

Christopher Uitvlugt

Panel:	Kari Horn Tom Cotter
Representation:	Yasifina Somji for Commission Staff
Submissions Completed:	December 20, 2021
Decision:	January 6, 2022

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I. INTRODUCTION

[1] In a Notice of Hearing issued on April 21, 2021 and amended on November 1, 2021 (the **Amended NOH**), Alberta Securities Commission (**ASC**) staff (**Staff**) seek orders that would permanently prohibit Christopher Uitvlugt (**Uitvlugt**) from participating in Alberta's capital market. Staff rely on s. 198.1(2)(a) of the *Securities Act* (Alberta) (the **Act**), which provides that an order may be made under ss. 198(1)(a) to (h) against a person who has been convicted of an offence arising from a course of conduct relating to securities.

[2] On June 15, 2018, Uitvlugt was charged by indictment with, among other offences, one count of fraud over $5,000. Uitvlugt pleaded guilty to the fraud count and a conviction was entered in the Ontario Superior Court of Justice (the **Court**) on November 16, 2018. Uitvlugt was sentenced on November 12, 2019 to a five-year term of imprisonment (less time spent in pre-trial custody).

[3] Affidavit evidence satisfies us that Uitvlugt was served with the Amended NOH. Although s. 198.1(2) does not require that a respondent be provided with an opportunity to be heard, Uitvlugt was afforded that opportunity, but elected not to present evidence or make submissions.

[4] In support of the orders sought, Staff adduced affidavit evidence from an ASC securities investigator (the **First Affidavit**) and an ASC legal assistant (the **Second Affidavit**). Appended to the Second Affidavit were transcripts of the plea and synopsis of facts (the **Synopsis**) and the Court's sentencing reasons (the **Reasons for Sentencing**). Staff also filed written submissions.

[5] For the reasons that follow, we find that Uitvlugt was convicted of an offence arising from a course of conduct related to securities, and that it is in the public interest to issue the orders sought by Staff.

II. FACTS

A. Synopsis

[6] Uitvlugt admitted to the facts contained in the Synopsis, including those pertinent to Staff's case as summarized below.

[7] Uitvlugt was the CEO of Next Level Investments, a business registered in Ontario on April 8, 2016 and initially operated out of Uitvlugt's residence in Kingston, Ontario. By December 2016, the business became Next Level Capital Group (together with Next Level Investments, **Next Level**) and had acquired a stand-alone location in Kingston (the **Real Estate**).

[8] Next Level offered individual investors the opportunity to make a return of up to 550% on a three-month term investment. This return was to be generated by Uitvlugt using investors' money to trade in the foreign exchange market with the resulting profit apportioned equally between the investor and Next Level.

[9] Early on, Uitvlugt offered his friend and roommate KM a sales representative position, and by December 2016, Next Level had several sales representatives and administrative staff. None of Uitvlugt, KM or any of the other sales representatives had any financial or investment education, nor were Uitvlugt or KM registered under the *Securities Act* (Ontario).

[10] The police investigation included a review of Uitvlugt's personal and business accounts, as well as Next Level's accounts. The review showed investors' money had been deposited and then used to pay out other investors, from which the police concluded that Next Level was a Ponzi scheme. Police also found evidence that substantial amounts of cash were also received from investors, although the amounts received and paid out in cash transactions could not be quantified as they were not reflected in the bank records.

[11] As part of the investigation, a forensic accountant examined transactions in Next Level's bank accounts. The accountant's report (the **Report**) concluded that investor deposits represented between $4.35 million and $4.84 million (the **Investor Deposits**) of the over $4.9 million deposited into the Next Level bank accounts, and identified transactions involving 874 investors. Uitvlugt used less than one percent (approximately $24,000) of the Investor Deposits in his foreign exchange trading accounts and the resulting trades led to a net loss of about $5,000.

[12] Payments to some investors out of these accounts totalled between $2.66 million and $3.23 million. Those payments were funded by subsequent investors, not Uitvlugt's foreign exchange trading. Some of the early investors who were paid out also made profits on their investments, however the Report identified 678 investors who did not receive any payments. These investors contributed approximately $3.53 million to Uitvlugt's scheme.

[13] Uitvlugt used Investor Deposits to pay for unauthorized personal expenses, such as his Lamborghini and Audi automobiles, and for Next Level expenses, including the purchase of the Real Estate.

[14] Approximately $2,232,000 in money and property was recovered or made the subject of restraint orders as proceeds of crime from the Next Level Ponzi scheme.

B. Sentencing

[15] The Court considered a joint submission of counsel, victim impact statements from a number of investors, and a pre-sentence report – none of which was before us – as well as the Synopsis before delivering the Reasons for Sentencing on November 12, 2019.

[16] Referring to the investors' statements, Justice Tranmer noted the financial and emotional costs incurred as a result of Uitvlugt's fraud and pointed out that Uitvlugt took advantage of the good reputations of his investors to prey on their friends and family. He described Uitvlugt's conduct as "shameful, deplorable, and . . . unconscionable" and ". . . profoundly life changing for innocent people . . .".

[17] The Court sentenced Uitvlugt to a five-year term of imprisonment, less time spent in pre-trial custody. Sentencing also included a forfeiture order and a DNA order.

C. Affidavit Evidence

[18] The First Affidavit referred to a search indicating that Uitvlugt was "formerly a resident of Alberta" and that the detective who co-led the investigation advised the affiant that up to ten Alberta investors were located during the investigation.

III. ANALYSIS

[19] Section 198.1(2)(a)(i) of the Act establishes the basis upon which an order may be made by the ASC under s. 198(1), providing ". . . an efficient means for furthering investor protection and the fair operation of Alberta's capital market, and confidence in that market, on the basis of a finding already made [by a court]" (*Re Braun*, 2007 ABASC 694 at para. 12).

[20] The issues under consideration are: first, whether Uitvlugt has been convicted of an offence arising from a transaction, business or course of conduct related to securities or derivatives, and second, whether we should exercise our jurisdiction to make protective orders in the public interest against Uitvlugt.

A. Transaction, Business or Course of Conduct Related to Securities

[21] We are satisfied from Uitvlugt's admission of facts in the Synopsis that his fraudulent investment scheme constituted a course of conduct over a period of approximately 12 months and involved at least 874 investors. The next question is whether the course of conduct related to securities or derivatives within the meaning of the Act.

[22] The Next Level investments were not referred to as "securities" in the Synopsis or in the Reasons for Sentencing, but Staff argued that the investments fall under the definition of security in the Act as being either evidence of indebtedness (s. 1(ggg)(v)) or investment contracts (s. 1(ggg)(xiv)).

[23] We first consider whether the investments are investment contracts. While not defined in the Act, the term "investment contract" has been construed to mean an investment of money in a common enterprise with an expectation of profit derived significantly from the effort of others (*Pacific Coast Coin Exchange v. O.S.C.*, [1978] 2 S.C.R. 112).

[24] Clearly Uitvlugt's scheme involved the investment of funds with an expectation of profit. Investors were offered the "opportunity to make up [to] a 550% rate of return on three-month term investments". The investors were to derive these significant profits through Uitvlugt's supposed foreign exchange trading efforts.

[25] In determining whether the common enterprise aspect of the investment contract test is met, we are guided by *Pacific Coast*, where the Supreme Court held (at pp. 129-30) that:

> . . . such an enterprise exists when it is undertaken for the benefit of the supplier of capital (the investor) and of those who solicit the capital (the promoter). . . . the "commonality" necessary for an investment contract is that between the investor and the promoter. There is no need for the enterprise to be common to the investors between themselves.

[26] In this case, the necessary commonality is clearly present in that 50% of the profits derived from Uitvlugt's trading efforts were to be returned to the investors and the remaining 50% were to be kept by Next Level. Accordingly, we find that the investments were investment contracts and thus securities within the meaning of the Act.

[27] Given this conclusion, we need not consider whether the investments are a security by virtue of being "evidence of indebtedness" under s. 1(ggg)(v) of the Act.

[28] For the foregoing reasons, we find that Uitvlugt's conviction arose from a course of conduct relating to securities.

B. Public Interest

[29] Having found that the necessary conditions of s. 198.1(2)(a) are met, we next turn to whether the imposition of the protective orders sought by Staff is warranted in the public interest (see *Re Leemhuis*, 2008 ABASC 585 at para. 12).

[30] The ASC has previously considered and issued protective orders under s. 198(1) in relation to criminal convictions for securities-related fraud: see for example, *Re Carruthers*, 2020 ABASC 177 and *Re LaFramboise*, 2020 ABASC 12. In each decision, the panel cited *Braun* at para. 17 (citing *Re O'Connor*, 2005 ABASC 987 at para. 26) for the principle that making such orders is in the public interest ". . . only when doing so would provide protection to Alberta investors and the Alberta capital market."

[31] ASC decisions have consistently emphasized the seriousness of fraud, most recently in *Carruthers* at para. 32, referring to *Re TransCap Corporation*, 2013 ABASC 201 at para. 155, where an ASC panel observed that it is ". . . self-evident that conduct that perpetrates a fraud on Alberta investors is wholly inconsistent with the welfare of investors and the integrity of our capital market".

[32] In *LaFramboise*, the panel noted that securities commissions from other jurisdictions have taken a view consistent with prior ASC decisions regarding the seriousness of fraud. There, the panel cited as an example the Ontario Securities Commission decision in *Re Reeve*, 2018 ONSEC 55 at para. 28:

> . . . fraud is one of the most egregious violations of securities law. It causes direct and immediate harm to its investors, and it significantly undermines confidence in the capital markets.

[33] Consequently, as the panel stated in *Carruthers* (at para. 32):

> . . . where Staff seeks reciprocation of a criminal conviction for securities-related fraud, particularly where that fraud was perpetrated on Alberta investors, it is difficult to conceive of a circumstance when orders under section 198(1) would not be considered to be in the public interest.

[34] As many as ten of Uitvlugt's fraud victims were Alberta residents, and we are persuaded that it is in the public interest to issue orders under s. 198 of the Act to protect Alberta investors and our capital market.

C. Orders Sought

[35] In assessing whether the orders sought by Staff appropriately address the deterrence and protection called for in the circumstances, we have taken into account the sanctioning factors that we have applied in our prior decisions, including the seriousness of the misconduct, the respondent's characteristics and history, any benefit sought or obtained by the respondent, and any mitigating or aggravating considerations: *Re Homerun International Inc.*, 2016 ABASC 95 at para. 20.

[36] Uitvlugt's use of a Ponzi scheme accentuates the seriousness with which we view his fraud "as it necessarily involves a substantial degree of deceit and dishonesty – there is 'a pernicious aspect to the payments' made to investors in a Ponzi scheme in that they give 'a comforting impression that the investments made were sound and otherwise as represented'" (*Carruthers* at para. 35, citing *TransCap* at para. 108).

[37] Uitvlugt's scheme affected at least 874 victims, and the overall fraud amounted to as much as (and perhaps more than) $4.8 million. As noted above, while some of the funds were used to continue the fraud, investors' funds were also misappropriated for Uitvlugt's personal use. It is especially egregious that Uitvlugt took advantage of the good reputations of his investors to prey on others, compounding the harm done to those investors who referred their friends, family and others to Uitvlugt.

[38] In his Reasons for Sentencing, Justice Tranmer noted multiple aggravating factors, including the ". . . magnitude of the operation, the amount of money, and the unbelievable number of victims . . .". He further observed that Uitvlugt's conduct involved ". . . a high degree of planning and sophistication" and ". . . vulnerable victims who suffered the consequences of . . . [his] overwhelming greed".

[39] The sentencing judge noted several mitigating factors, including Uitvlugt's waiver of the preliminary inquiry, his guilty plea, and the support of his family. We have also taken into account the character-related comments that Justice Tranmer considered to be mitigating – that Uitvlugt had no prior criminal record and that he is a good dad.

[40] Having considered the Synopsis and Sentencing Decision in our assessment of the *Homerun* sanctioning factors, we are persuaded that the orders sought by Staff are reasonable and proportionate to the seriousness of Uitvlugt's misconduct and are thus necessary to protect the public interest.

IV. SANCTIONS ORDERED

[41] Accordingly, we order in the public interest with permanent effect:

- under ss. 198(1)(b) and (c) of the Act, Uitvlugt must cease trading in securities or derivatives, and all of the exemptions contained in Alberta securities laws do not apply to him;

- under ss. 198(1)(d) and (e), Uitvlugt must immediately resign all positions he holds as a director or officer of any issuer, registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization or designated benchmark administrator, and he is prohibited from becoming or acting as a director or officer (or both) of any issuer (or other person or company that is authorized to issue securities), registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized

trade repository, designated rating organization or designated benchmark administrator; and

- under s. 198(1)(c.1), (e.1), (e.2) and (e.3), Uitvlugt is prohibited from engaging in investor relations activities, from advising in securities or derivatives, from becoming or acting as a registrant, investment fund manager or promoter, and from acting in a management or consultative capacity in connection with activities in the securities market.

[42] This proceeding is concluded.

January 6, 2022

For the Commission:

"original signed by"
Kari Horn

"original signed by"
Tom Cotter